Illinois, Eastern Division, which approved a Plan of Reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Plan of Reorganization which was so approved had been certified to the District Court by the Interstate Commerce Commission *after* the decisions of this Court under Section 77 of the National Bankruptcy Act rendered March 15, 1943.*

A writ of *certiorari* was asked by this Petitioner on the basic ground that an identical appeal had been entertained by the Circuit Court of Appeals in the Tenth Circuit from an Order or Decree of the District Court for the District of Colorado approving a Plan of Reorganization for The Denver and Rio Grande Western Railroad Company. This Plan of Reorganization also had been certified to the District Court by the Interstate Commerce Commission *after* the above mentioned decisions of this Court rendered March 15, 1943.

Our view then was that the refusal of a Circuit Court of Appeals in one Circuit to hear an appeal identical in its fundamental aspects with an appeal which had been entertained by a Circuit Court of Appeals in another Circuit disclosed a conflict of opinion between Circuits in a matter of great public importance that ought not to exist. To correct this a writ of *certiorari* seemed appropriate.

But this Court nevertheless denied the Petition of Darragh A. Park for such writ by Order entered March 12, 1945.

Since the adverse action upon the Petition for the writ of *certiorari* was taken by this Court a decision has been rendered by the Circuit Court of Appeals in the Tenth Circuit reversing the Order and Decree of the District Court for the District of Colorado and referring back to the

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* *Ecker et al.* v. *Western Pacific Railroad Corporation, et al.*, 318 U. S. 448; *Group of Institutional Investors et al.* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523.

Interstate Commerce Commission the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company for further proceedings in accordance with Subsection (e)—*i. e.* for a new Plan.

The proponents of the old Plan which has been condemned by the Circuit Court of Appeals for the Tenth Circuit have informed your Petitioner's counsel that it is their purpose to apply to this Court for a writ of *certiorari* to review that decision and that the papers are in course of preparation for prompt filing. If this Court shall determine to grant a writ of *certiorari* to review the decision so rendered by the Circuit Court of Appeals in the Tenth Circuit it may deem it appropriate in the interest of uniformity in the administration of justice to reconsider its refusal to grant such writ to review the decision of the Circuit Court of Appeals in the Seventh Circuit.

While there may be minor points of differentiation it will be impossible to avoid the conclusion that in all points of substance which are really fundamental the two cases are identical and this is also true of most if not all of the seventeen cases now pending under Section 77 of the National Bankruptcy Act.

Either all of the cases are right or all are wrong *fundamentally.*

In *point of fact* we now know that all of these are wrong. The Judiciary Committee of the House of Representatives a Committee enjoying an exceptional measure of public confidence have formally reported to the House of Representatives and the House of Representatives with but a single dissenting vote has accepted and approved their Report, the substance of which is that this Court has misapprehended and misinterpreted Section 77 of the National Bankruptcy Act. The Judiciary Committee says with the candor permissible from a body of its stature and status under the federal Constitution that this Court has con-

verted an Act of Congress designed as one for the "Relief of Debtors" into a statute under which a Debtor's equity may be taken from the owners by *fiat* of an administrative Board without the kind of judicial review contemplated by the Congress. Certainly no one will gainsay that the Judiciary Committee knows *in fact* what was intended by legislation which it formulated.

In *point of law* there may be a question whether this Court was justified in reaching the wrong result which indubitably it did reach by reason of the use in the Statute itself of inept or inartistic language. It may be conceded that the Statute is not wholly free from ambiguity. Few complicated Statutes ever attain such a standard of perfection. If, however, an opportunity be afforded by the granting of a rehearing upon and the issue of a writ of *certiorari* under the Petition of Darragh A. Park herein dated January 25, 1945, we feel confident that we can convince this Court to its own satisfaction that its misinterpretation of Section 77 was not the result of faulty draftsmanship fairly attributable to Congress but was due to its own failure to give adequate weight to establish canons of statutory construction.

We recognize that a rehearing upon a Petition for a writ of *certiorari* is rarely granted and then only in exceptional circumstances. But we feel that this case is definitely in the category of exceptional cases. It is but one of the seventeen proceedings that are pending in the Interstate Commerce Commission and in the Courts under Section 77 of the National Bankruptcy Act. The District Courts and the Circuit Courts of Appeals are governed in all of these cases by the interpretations placed upon the National Bankruptcy Act by this Court, which interpretations the Judiciary Committee says are wrong and which as is evident certain of the Circuit Courts of Appeals think should be reconsidered.

The Circuit Court of Appeals in the Seventh Circuit seems to be quite clearly of the opinion that this Court erred in permitting the Interstate Commerce Commission to alter property rights by moving backward and forward the effective date of a Plan of Reorganization. The Opinion of that Court written by Circuit Judge MAJOR in which that view is expressed is annexed as Appendix A to the Petition herein dated January 25, 1945. If and when the Petitions for writs of *certiorari* are presented to this Court seeking a review of the decision of the Circuit Court of Appeals in the Tenth Circuit in the proceeding for the reorganization of The Denver and Rio Grande Western Railroad Company the full Opinions rendered by Judges HUXMAN and PHILLIPS will be furnished; but we annex hereto as Appendix A to this Petition for rehearing the concurring Opinion of Circuit Judge PHILLIPS.

From what is said by Judge PHILLIPS and from his excerpts taken from the Report of the Judiciary Committee of the House of Representatives it is clear that the situation created by the decisions of this Court rendered March 15, 1943 is a grave one which this Court may itself undertake to remedy.

The Petitioner respectfully urges that conditions have so changed and our prospectives have so widened since this Court acted adversely on the Petition herein for a writ of *certiorari* as to justify reconsideration of railway reorganization problems regardless of whether a writ of *certiorari* is asked or granted to review the recent decision of the Circuit Court of Appeals for the Tenth Circuit. If, however, this Court shall determine to review that decision as a base for a reconsideration of the two decisions rendered March 15, 1943 it would seem to follow that the Petitioner is entitled to a rehearing upon his Petition for a writ of *certiorari* almost as a matter of course.

WHEREFORE, the petitioner respectfully prays that this Court pursuant to Rule 33 grant a rehearing of his Petition for a writ of *certiorari* filed herein on January 25, 1945, and that a writ of *certiorari* be issued in accordance with the prayer of said Petition.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
Attorney for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds,
40 Wall Street,
New York 5, New York.

June 7, 1945.

Certificate of Counsel

I, FRANK C. NICODEMUS, JR., attorney and counsel herein for Darragh A. Park, as Chairman of a Group of Holders of the Debtor's Adjustment Mortgage Bonds, do hereby certify pursuant to Rule 33 that the foregoing Petition for rehearing is presented in good faith and not for delay.

FRANK C. NICODEMUS, JR.

June 7, 1945.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

Nos. 2906, 2907, 3106, 3107 and 3108—NOVEMBER TERM, 1944.

In the Matter of The Denver and Rio Grande Western Railroad Company, a corporation, Debtor. The Denver and Rio Grande Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
The Denver & Salt Lake Western Railroad Company, a corporation, Debtor, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
City Bank Farmers Trust Company, a corporation, as Trustee under the General Mortgage, February 1, 1924, of The Denver and Rio Grande Western Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

The Denver and Rio Grande Western Railroad Company, a corporation, Debtor; and The Denver & Salt Lake Western Railroad Company, a corporation, Subsidiary Debtor, Appellants, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.
Guy A. Thompson, as Trustee of the Missouri Pacific Railroad Company, Appellant, *vs.* Insurance Group Committee, *et al.*, Appellees.	Appeals from the United States District Court for the District of Colorado.

[May 10, 1945]

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges

PHILLIPS, Circuit Judge, concurring:

The broad language of the Supreme Court in the Western Pacific case and the Milwaukee case[1] compels me to conclude that we cannot disturb the Commission's finding of valuation nor the finding of the Commission, confirmed by the trial court, that the equities of the unsecured creditors and the preferred and common stockholders have no value. Nevertheless, I feel impelled respectfully to suggest that the elimination of a substantial portion of the claim of the holders of the general mortgage bonds and all of the claims of stockholders and unsecured creditors, on the basis of a valuation resting wholly on an estimate of

[1] Ecker *v.* Western Pacific R. Corp., 318 U. S. 448; Group of Investors *v.* Milwaukee R. Co., 31 U S. 523.

future earnings, is harsh treatment of such claims. I say this because, while according expertness to the Commission, it is my opinion that such future earnings cannot be estimated with a degree of certainty that is not likely to result in grave injustice.

The injustice to junior security holders which may result from a valuation based solely on an estimate of future earnings has aroused the attention of Congress and corrective legislation has been introduced. H. R. 4960 has already passed the House and is pending before a Senate Committee.[2]

On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization.

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[2] The House Judiciary Committee, in its unanimous report (78th Cong., 2d Sess., Report No. 1615) recommending passage of H. R. 4960, in part said:

"The purpose of the bill is to correct a very serious situation arising from the interpretation placed by the Interstate Commerce Commission and the courts upon the amendments of section 77 enacted by the Congress August 27, 1935. We believe this situation results from a misapprehension of the intention of Congress with respect to the 1935 amendments. The consequences have been and are so disastrous to railroad investors, and so dangerous to the credit of the railroads in general, that they should be corrected by legislation.

"From a legal standpoint, the problem may be stated simply. Section 77 was directed primarily to the relief of financially embarrassed railroad companies through a revision of their capital structures and a reduction of fixed charges. It does not expressly provide for any reduction in the existing total capitalization; but the Interstate Commerce Commission has interpreted paragraph (d) of the section as authorizing it to fix the total capitalization of the reorganized company. In so doing, it has estimated a 'capitalizable value of the assets' of the property based almost entirely upon 'earning power'—earning power of the property, past, present and prospective—as these words are used in section 77(e). Its estimates of prospective earning power are necessarily speculative. Nevertheless it has used its estimates of earning power to fix capitalizations in all cases very substantially below the existing capitalizations, regardless of the investment in the property and of the valuation previously determined by the Commission under section 19a of the Interstate Commerce Act. The Supreme Court in passing upon two major reorganization plans—the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific—upheld the Commission in this interpretation of the section, and has further held that the Commission's findings will not be disturbed where there is some evidence to support them. In other words, these administrative findings are beyond judicial review.

"The result of this interpretation of the statute by the Commission, and the subsequent refusal of the courts to review the Commission's findings, has caused the destruction of hundreds of millions of dollars of railroad securities representing actual investment in the property